Governance & Securities Alert

Weil

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

October 13, 2023

SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting

By Howard Dicker, Adé Heyliger, Alicia Alterbaum and Steven Bentsianov

On October 10, 2023, the SEC adopted amendments to the rules governing beneficial ownership reporting. Among other things, the new rules generally shorten the deadlines for Schedule 13D and Schedule 13G filings, clarify the disclosure and beneficial ownership requirements with respect to derivative securities, and provide guidance regarding "group" formation. The amendments also extend the "cut-off" time to submit Schedule 13D and Schedule 13G filings from 5:30 p.m. to 10 p.m., Eastern time, and require that all disclosures in such filings, other than exhibits, be made using a structured, machine-readable data language. Generally, the amendments become effective 90 calendar days after publication in the federal register, except that compliance with the revised Schedule 13G deadlines will be required beginning on September 30, 2024.

Revised Filing Deadlines:

Schedule 13D

- Deadline for filing initial Schedule 13D shortened from 10 calendar days to 5 business days; and
- Schedule 13D amendments required be filed within 2 business days (rather than "promptly").[1]

Schedule 13G

- Initial Schedule 13G filing deadline for passive investors[2] (when their beneficial ownership exceeds 5%) shortened from 10 calendar days to 5 business days;
- Initial Schedule 13G filing deadline for qualified institutional investors ("QIIs")[3] and exempt investors[4] (when their beneficial ownership exceeds 5%) changed from 45 calendar days after the end of a calendar year to 45 calendar days after the end of the calendar quarter;

[1] Practitioners were already generally following a two business day practice for Schedule 13D amendments, which aligns with the two business day deadline for Section 16 Form 4 filings.

[2] These investors are ineligible to report beneficial ownership pursuant to Rules 13d-1(b) or (d) but are eligible to report beneficial ownership on Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d-1(c).

[3] These investors are eligible to report beneficial ownership on Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d-1(b).

[4] These investors are eligible to report beneficial ownership on Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d-1(d).

- Initial and amendments to Schedule 13G obligations for QIIs (when their beneficial ownership exceeds 10% or increases or decreases by 5%) shortened from 10 calendar days to 5 business days after the end of the month in which the obligation is triggered;
- Amendments for all Schedule 13G filers changed from 45 calendar days after the calendar year in which *any* change occurred to 45 calendar days after the calendar quarter in which a *material* change occurred; and

For a chart summarizing the changes to the filing requirements, see *Appendix A* hereto.

Guidance on Derivative Securities:

Updated Item 6 of Schedule 13D

The new rules clarify that Item 6 of Schedule 13D requires disclosure of cash-settled equity swaps and other derivative securities where any class of an issuer's securities are used as a reference. Specifically, revised Item 6 requires a filer to:

> Describe any contracts, arrangements, understandings, or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer, including ~~but not limited to~~ any class of such issuer's securities used as a reference security, in connection with any of the following: call options, put options, security-based swaps or any other derivative securities, transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, ~~puts or calls,~~ guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

Beneficial Ownership and Cash-settled Derivative Securities

Instead of adopting proposed amendments to the standards for determining who is a beneficial owner under Rule 13d-3, the SEC instead elected to provide guidance on when, under existing rules, a beneficial owner of a cash-settled derivative security may be deemed to be the beneficial owner of the reference security. For example, the SEC noted that, to the extent a cash-settled derivative security provides its holder with exclusive or shared voting or investment power over the reference covered class[5] through a contractual term of the derivative security or otherwise, the holder of that derivative security may become a beneficial owner of the reference covered class. The SEC also flagged that to the extent a cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class, or preventing the vesting of that beneficial ownership, as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g), the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b).

Group Formation and Cash-settled Derivative Securities

The SEC noted that although investors in a cash-settled derivative security may need to enter into an agreement governing the terms of such instrument with a financial institution that, in the ordinary course of its business, acts as a counterparty to such investors, that agreement, without more, does not result in "group" formation within the meaning of Sections 13(d)(3) and 13(g)(3).

[5] "Covered class" generally means, with limited exception, a voting class of equity securities registered under Section 12 of the Securities Exchange Act of 1934, as amended.

Guidance on Group Formation:

Rather than adopt proposed amendments to existing rules, the SEC provides guidance in the adopting release, in question and answer format (see *Annex B* hereto for the full text), on when two or more persons may be deemed to have formed a "group" within the meaning of Sections 13(d)(3) and 13(g)(3) under certain common types of shareholder engagement activities.[6] For example, the SEC clarified that a "group" would be formed if a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants (or investors) make purchases in the same covered class as a direct result of that communication.

Extended "Cut-Off" Time and Required Structured, Machine Readable Data Language

The filing "cut-off" times for Schedules 13D and 13G will be extended from 5:30 p.m. to 10:00 p.m., Eastern time. Additionally, all disclosures in Schedule 13D and 13G filings, other than exhibits, will be required to be made using a structured, machine readable data language.

Compliance Dates:

The amendments will become effective 90 calendar days after publication in the Federal Register, except that:

- Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024.
    - As a result, for example, QIIs and exempt investors will be required to file an amendment to their Schedule 13Gs within 45 days after September 30, 2024 if, as of end of the day on that date, there were any material changes in the information the filer previously reported on Schedule 13G.
- Compliance with the structured data requirement for Schedules 13D and 13G will be required beginning on December 18, 2024 (with voluntary compliance permitted beginning December 18, 2023).

[6] The decision to not adopt a rule amendment was driven in part by the SEC's recognition of concerns raised by some commenters that the proposed rule amendments could chill shareholder communications between each other or with the issuer's management.

Appendix A

Summary of Updates to Schedule 13D and Schedule 13G Filing Requirements

(yellow shading highlights changes)

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Initial Filing Deadline	10 calendar days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f), and (g).	Five business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f), and (g).	QIIs & Exempt Investors: 45 calendar days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: 10 calendar days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: 10 calendar days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	QIIs & Exempt Investors: 45 calendar days after calendar quarter-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: Five business days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).
Amendment Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	Same as current Schedule 13D: Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Same as current Schedule 13G: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d-2(a).	Two business days after the triggering event. Rule 13d-2(a).	All Schedule 13G Filers: 45 calendar days after calendar year-end in which any change occurred. Rule 13d-2(b). QIIs: 10 calendar days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(c). Passive Investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(d).	All Schedule 13G Filers: 45 calendar days after calendar quarter-end in which a material change occurred. Rule 13d-2(b). QIIs: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(d).
Filing "Cut-Off" Time	5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.

Appendix B

New SEC Guidance on "Group" Formation
(Excerpt Adapted from SEC Adopting Release)

Question: Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control related), or a "vote no" campaign against individual directors in uncontested elections) without taking any other actions?

Response: No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an "act" undertaken for the purpose of "holding" securities of the issuer under Section 13(d)(3) or 13(g)(3).

Question: Is a group formed when two or more shareholders engage in discussions with an issuer's management, without taking any other actions?

Response: No. For the same reasons described above, we do not believe that two or more shareholders "act as a . . . group" for the purpose of "holding" a covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer's management.

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers' management that does not implicate the policy concerns addressed by Section 13(d) or Section 13(g).

Question: Is a group formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders?

Response: No. The Rule 14a-8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer's management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a-8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer's management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal,[7] those statutory provisions would not result in the shareholders being treated as a group, and the shareholders' beneficial ownership would not be aggregated for purposes of determining whether the five percent threshold under Section 13(d)(1) or 13(g)(1) had been crossed.

Question: Would a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, such as consenting or committing to a course of action,[8] constitute such coordination as would result in the shareholder and activist being deemed to form a group?

Response: No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation. Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation, depending upon the facts and circumstances.

Question: Would an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

Response: No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws.[9] Shareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.

[7] The conclusion reflected in this example assumes the Rule 14a-8 or other non-binding shareholder proposal is submitted jointly and without "springing conditions" such as an arrangement, understanding, or agreement among the shareholders to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, not acted upon favorably by the issuer's board.

[8] Examples of the type of consents or commitments given in furtherance of a common purpose to acquire, hold (inclusive of voting), or dispose of securities of an issuer could include the granting of irrevocable proxies or the execution of written consents or voting agreements that demonstrate that the parties had an arrangement to act in concert.

[9] For example, public announcement of a voting intention qualifies for the exclusion from the definition of solicitation under Rule 14a-1(l)(2)(iv).

Question: If a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

Response: Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these beneficial owners are "act[ing] as" a "group for the purpose of acquiring" securities of the covered class within the meaning of Section 13(d)(3). Such purchases may implicate the need for public disclosure underlying Section 13(d)(3) and these purchases could potentially be deemed as having been undertaken by a "group" for the purpose of "acquiring" securities as specified under Section 13(d)(3).[10] Given that a Schedule 13D filing may affect the market for and the price of an issuer's securities, non-public information that a person will make a Schedule 13D filing in the near future can be material. By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made. Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.[11] The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

* * *

[10] While each group member individually bears a reporting obligation arising under Rule 13d-1(k)(2), a tippee would not become a member of a group, and thus would not incur a reporting obligation, until it makes a purchase of securities of the same covered class in response to having been tipped even if the tippee already is a beneficial owner of that class.

[11] For example, any near-term gains made by these other investors attributable to information about the impending filing may cause uninformed shareholders who sell at prices reflective of the status quo to question the efficacy of existing regulatory framework. Even though the demand to acquire shares in the covered class may increase as a direct result of the blockholder's communications, and in turn increase the prices at which selling shareholders exit, such prices may be discounted in comparison to the price such shareholders would have realized had the information about the impending Schedule 13D filing been public

If you have questions concerning the contents of this Alert, or would like more information, please speak to your regular contact at Weil or to any of the following authors:

Authors

Howard B. Dicker	View Bio	howard.dicker@weil.com	+1 212 310 8858
Adé K. Heyliger	View Bio	ade.heyliger@weil.com	+1 202 682 7095
Alicia Alterbaum	View Bio	alicia.alterbaum@weil.com	+1 212 310 8207
Steven Bentsianov	View Bio	steven.bentsianov@weil.com	+1 212 310 8928